# HARMONISING CONSTITUTIONAL IDEALS: A MODERN REASSESSMENT OF THE BASIC STRUCTURE DOCTRINE

*Kartikay Agarwal & Harmanjot Kaur*[*]

*The basic structure doctrine first theorised in the case of Kesavananda Bharati v. State of Kerala ('Kesavananda Bharati'), is a judicial tool to protect and preserve the foundation of the Indian Constitution, 1950. It originated to complement further the idea of exercising restraint upon the constituent power of the Parliament. This paper is a study of the academic and historical genesis of the basic structure doctrine, developments in the doctrine post the case of Kesavananda Bharati and the constitutional and jurisprudential questions that surround it in today's time and age. The study of these questions is situated in four contemporary issues – applicability of the doctrine upon the legislative power of the Parliament, questioning the precedential validity of the Kesavananda Bharati case upon the touchstone of the doctrine of stare decisis, the doctrine of legislative overruling and the gaps it creates in achieving constitutional governance, and the overlap between constitutional morality and the doctrine of basic structure. All the aforesaid questions are elements in the larger scheme of separation of powers and judicial review. The paper critically evaluates these broad questions while situating them in the realities of the country today.*

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## I. INTRODUCTION

A few democracies around the world have survived and sustained because they are usually governed by a Constitution – the higher law from which all other laws and daily politics derive their legitimacy. Constitution, as a term, might generally and singularly depict for itself to be the compendium of the basic principles of the State, the structures and processes of government and the fundamental rights of citizens in a higher law that cannot be unilaterally

[*] 5th-year B.A. LL.B. (Hons.) students at Dr. Ram Manohar Lohiya National Law University, Lucknow, and Nirma University, Ahmedabad, respectively. The paper was awarded the 3rd prize for the sub-theme: Scope of Judicial Review, at the Nani A. Palkhivala Memorial Essay Competition, 2023, organised by WBNUJS, Kolkata, and Nani A. Palkhivala Memorial Trust, with support from the Tata Group. The panel of judges for the aforesaid sub-theme consisted of Justice M. R. Shah, Professor Upendra Baxi, Rohit De, and Saptarshi Mandal. All errors, if any, are solely attributable to the author. The author may be contacted at kartikay.ka@gmail.com and kaur.harmanj@gmail.com, respectively, for any feedback or comments.

changed by an ordinary legislative act.[1] However, they are also reflective of a nation, its history and struggle for freedom, its diversity, culture and ethnicity, and aspirations of the people of perfect civil order.[2]

The process of drafting a Constitution, especially in India, was more than merely a bureaucratic and administrative affair. The essence of crafting it lies in recollection and valorising the past, customising it to the present and leaving it flexible enough for the future. In the process, the entire assembly of drafters more often than not resolve upon certain 'basic principles' of the Indian Constitution, 1950, ('the Constitution') which are inalienable, cannot be tampered with and form the very basis of its conception. The judiciary of a nation is bestowed upon with the responsibility of adjudicating disputes, interpreting various laws which includes the Constitution, and also preserving the originality and integrity of the Constitution. This intention of the judiciary to protect the spirit of the Constitution forms the basis of the genesis of various doctrines, the most important of which is the basic structure doctrine of the Constitution.

The doctrine of basic structure is no Indian invention but is instead a protégé of the theory of implied limitation famously conceptualised by Professor Dietrich Conrad, formerly Head of the Law Department, South Asia Institute of the University of Heidelberg, Germany.[3] It was first heard of in the judicial reasoning in India in 1967 when it was argued for by a Constitutional lawyer, M. K. Nambiar in the case of *Golaknath* v. *State of Punjab*,[4] ('Golaknath'). While it is primarily believed that "Golaknath marks a watershed in the history of the Supreme Court of India's evolution from a positivist Court to an activist Court",[5] the court refused to accept the doctrine.

The fact that the need for such doctrines arose was a matter of enquiry. The necessity of these doctrines was felt due to apprehensions on the Parliament's power to amend the Constitution and dubiously tamper with its originality. The argument that the amending power of the Parliament was subject to substantive limitations was first raised in *Sankari Prasad Deo* v. *Union of India*,[6] ('Shankari Prasad'). As the case dates as early as 1951, therefore, implying a positivist judicial approach, the court ruled that the Parliament's power to amend the Constitution was unlimited, without being subject to any limitation. The same question was again raised in the case of *Sajjan Singh* v. *State of Rajasthan*,[7] and while the court upheld the verdict of Sankari Prasad, Mudholkar J. in the former case had certain reservations. He observed that the Constitution could not have been drafted to be a mere instrument at the hands of a majority to fulfil their whims and that the drafters must have intended for it to contain certain 'basic' and permanent features. This became the first instance of stressing upon the 'basic features' of the Constitution and questioning whether this could be taken away.[8] This position of law protecting the unhinged amending power of the Parliament was reversed by a

[1] Elliot Bulmer, *What is a Constitution? Principles and Concepts*, Institute for Democracy and Electoral Assistance, 2017, available at https://www.idea.int/sites/default/files/publications/what-is-a-constitution-primer.pdf (Last visited on August 2, 2023).
[2] Ernst-Wolfgang Bockenforde et al., *The Historical Evolution and the Changes in the Meaning of the Constitution*, Vol. 1, CONSTITUTIONAL AND POLITICAL THEORY: SELECTED WRITINGS (2016).
[3] Setu Gupta, *Vicissitudes and Limitations of The Doctrine of Basic Structure*, ILI LAW REV., 110 (2016).
[4] I. C. Golak Nath v. State of Punjab, AIR 1967 SC 1643.
[5] S. P. SATHE, JUDICIAL ACTIVISM IN INDIA, 66-67 (Eastern Book Company, 2002).
[6] Sri Sankari Prasad Singh Deo v. Union of India, 1951 SCC 966, ¶18.
[7] Sajjan Singh v. State of Rajasthan, 1965 SCR (1) 933, ¶63.
[8] Arvind Datar, *Legal Notes by Arvind Datar: Seeds of Basic Structure first sown by Justice JR Mudholkar*, February 11, 2023, available at https://www.barandbench.com/columns/legal-notes-arvind-datar-seeds-basic-structure-first-sown-justice-jr-mudholkar (Last visited on August 4, 2023).

ratio of 6:5 in Golaknath, which placed Part III of the Constitution beyond the scope of the Parliament to modify.

The shift in the judicial attitude towards the power of the Parliament to amend the Constitution was clearly visible, carving out a path for more robust judicial review and its culmination into the origin of the basic structure doctrine as it stands today. The Parliament tried to fight this by enacting the Constitution (Twenty-fourth Amendment) Act, 1971,[9] which stated that Article 13,[10] the anvil on which the constitutionality of laws is judged, will not apply to constitutional amendments under Article 368,[11] further immunising them from judicial review.

To challenge the same and conclude the debate over the Parliament's power of amending the Constitution, a thirteen-judge bench of the supreme court was constituted in the case of *Kesavananda Bharati* v. *State of Kerala*,[12] ('Kesavananda Bharati'). While the case did overrule Golaknath by holding that the Parliament's amending power was plenary and extended to every provision of the Constitution, they could not do so at the cost of destroying or trampling over the 'basic structure of the Constitution'.

The basic structure doctrine is too well-known to merit a detailed explanation. It does not protect specified articles or constitutional provisions but ascertains immunity to certain principles on which the Constitution stands today. There is no definition or exhaustive list of what the doctrine entails, but what it intends to do is very clear. It exemplifies that certain aspects of the Constitution are unchangeable, immutable, and so bound up with the fabric of the Constitution itself that as long as the Constitution exists, they too must necessarily exist.[13] Over the course of judicial history in India, various judicial pronouncements have added features and principles to the list of what entails the basic structure of the Constitution only to preserve the autochthonous constitutional scheme. These include the cases of *Indira Gandhi* v. *Raj Narain*[14] ('Raj Narain'), *Kihoto Hollohan* v. *Zachillhu*,[15] (free and fair elections), *Minerva Mills* v. *Union of India*,[16] ('Minerva Mills') (judicial review and balance between fundamental rights and directive principles of state policy) and *Waman Rao* v. *Union of India*,[17] (independence of judiciary).

This paper aims to understand the historical and theoretical backdrop of the birth of the basic structure doctrine, its development and the jurisprudential questions that engulf it. Part II of the paper traces the advancements and developments that occurred in the development of the basic structure doctrine. In Part III, the paper discusses the applicability of the basic structure doctrine over the legislative power of the Parliament. In Part IV, it questions the precedential value of the Kesavananda Bharati judgment and the defect it suffers *vis-a-vis* the doctrine of stare decisis. Thereafter, in Part V, it deals with the contemporary application of the doctrine of legislative overruling, and the inhibition it creates on the part of the legislature

[9] Gautam Bhatia, *Basic Structure – I: History and Evolution*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, November 1, 2013, available at https://indconlawphil.wordpress.com/2013/11/01/basic-structure-i-history-and-evolution/ (Last visited on August 2, 2023).
[10] The Constitution of India, 1950, Art. 13.
[11] The Constitution of India, 1950, Art. 368.
[12] Keshavananda Bharati v. State of Kerala, AIR 1973 SC 1461, 1730.
[13] Gautam Bhatia, *The Curious Case of Salient Features: Exploring the Current Relevance of the Basic Structure Doctrine in Pakistan*, INDIAN CONSTITUTIONAL LAW AND PHILOSOPHY, February 15, 2015, available at https://indconlawphil.wordpress.com/?s=basic+structure+doctrine (Last visited on August 2, 2023).
[14] Indira Gandhi v. Raj Narain, AIR 1975 SC 865.
[15] Kihoto Hollohan v. Zachillhu, 1992 SCR (1) 686.
[16] Minerva Mills v. Union of India, AIR 1980 SC 1789.
[17] Waman Rao v. Union of India, 1981 2 SCC 362.

in achieving its intent of constitutional governance. In Part VI, the paper discusses the overlap between the basic structure doctrine and constitutional morality, their shared objective and the challenges surrounding their coterminous application. Part VII offers concluding remarks.

## II. ADVANCEMENT AND JURISPRUDENTIAL STRENGHTING OF THE DOCTRINE

The ideological shift in the attitude of the Indian judiciary beginning from the early years of independence to the 1990s and even today, has more often than not coincided with political turmoil and upheavals in the governance structure. The series of events and judgements that transpired onto the Golaknath verdict very clearly brought the tension between the judiciary and the legislature to the forefront. The Supreme Court and the Parliament were at loggerheads over the relative position of fundamental rights *vis-à-vis* the Directive Principles of State Policy.[18] The larger issue that panned out was the battle between the supremacy of the Parliament as against the power of the courts to read, interpret and uphold the Constitution. The ruling government at the time made legislative efforts to overrule the Golaknath verdict, the validity of which was upheld in the case of Kesavananda Bharati. However, the case of Kesavananda Bharati stood apart because of the dichotomy it drew. While on one hand, it held that the Parliament has the power to amend any or all provisions of the Constitution and that Article 368 contained both the power of amending the Constitution and the procedure thereof, on the other hand, the majority of the bench also agreed upon the fact that in dispensing with this constitutional function, the Parliament could not 'damage', 'emasculate', 'destroy', 'abrogate', 'change' or 'alter' the 'basic structure' or the framework of the Constitution.[19]

In 1975, in the case of Raj Narain the judiciary had, for the first time after Kesavananda Bharati, applied and reaffirmed the basic structure doctrine. The matter at hand was the election of the then Prime Minister of India, Smt. Indira Gandhi, who was held to be a culprit of electoral malpractice by the Allahabad High Court and was pending an appeal. During the pendency of the appeal, the Parliament hastily passed the Constitution (Thirty-ninth Amendment) Act, 1975, in an attempt to thwart the power of the Supreme Court to adjudicate upon matters concerning the elections of the President, Vice President, Prime Minister and the Speaker of the Lok Sabha and gave the law a retrospective effect. Simultaneous amendments were made to relevant laws.[20] The amendment to the Constitution and the applicable laws were, *inter alia*, challenged on the ground of being violative of the basic structure doctrine. Consequently, not only was the amendment held to be unconstitutional on the grounds of violating the doctrine of separation of powers and free and fair elections, both of them being pertinent elements of the basic structure doctrine, the bench agreed upon the fact that the doctrine applied only upon the constituent power of the Parliament and not over its legislative power.[21] Despite the disagreement between the judges on what constituted the basic structure of the Constitution, the idea that the Constitution had a core content which was sacrosanct was upheld by the majority view.[22]

From 1975 onwards, many constitutional amendments have been legislatively brought, and many of them have been challenged on the grounds of being violative of the doctrine of basic structure. It is no surprise that the nature of the doctrine is expansive, open-

[18] Venkatesh Nayak, *The Basic Structure of the Indian Constitution*, 2016, available at https://constitutionnet.org/vl/item/basic-structure-indian-constitution (Last visited on August 2, 2023).
[19] *Id.*
[20] *Id.*
[21] Indira Gandhi v. Raj Narain, AIR 1975 SC 2299, 402.
[22] *Id.*

ended and ever-increasing. And while the Kesavananda Bharati case did agree upon the existence of a core of the Constitution in the form of its basic structure, no efforts have been made to codify and limit the contours of it. The courts have continuously interpreted and expanded the doctrine to include principles such as judicial review of decisions rendered by the High Court and the Supreme Court under Articles 226 and 32 respectively,[23] secularism and federalism,[24] the freedoms under Article 19,[25] judicial independence,[26] and recently, judicial primacy in the judicial appointment process,[27] to the basic structure and framework of the Constitution.

The doctrine of basic structure has been celebrated as being the guardian of Indian democracy. However, in recent times, owing to its excessive and rampant applicability, it has been attacked for being anti-democratic and counter-majoritarian in character.[28] Even after fifty years of its inception, many academic and legal issues still hover over the doctrine of basic structure of the Constitution. Apart from a structural issue of being undefined and vague, deeper issues penetrate and question the very legitimacy of the doctrine. The following parts of the paper attempt to discern a few contemporary issues that remain relevant in the debate and discussion around the basic structure doctrine.

## III. EXTENDING BASIC STRUCTURE TO PARLIAMENTARY LAWS

The decision rendered in the Keshvananda Bharati case has been discussed by constitutional experts and jurists at great length.[29] Its position can be been described as, "Despite the procedural foibles, however, and the exasperating vagueness of the idea of 'basic structure', Upendra Baxi was prescient when he described the Kesavananda opinion as "the constitution of the future".[30]

This constitution of the future, i.e., the basic structure doctrine, was formulated to test the validity of the constituent power of the parliament. The judicial dicta on the aforesaid is also well-settled that the doctrine applies only to the constituent power of the legislature and not to its legislative power, i.e. ordinary legislation cannot be tested on the touchstone of basic structure doctrine.[31] However, contrary to this settled position, the courts have used the doctrine to invalidate ordinary legislation.[32] Thus, this raises a very pertinent question – should, in

[23] S. P. Sampath Kumar v. Union of India, AIR 1987 SC 386; L. Chandra Kumar v. Union of India, AIR 1997 SC 1125.
[24] S. R. Bommai v. Union of India, AIR 1994 SC 1918.
[25] R. Coelho v. State of Tamil Nadu, AIR 2007 SC 861.
[26] Supreme Court Advocates-on-Record Association and Another v. Union of India, (1993) 4 SCC 441.
[27] *Id*.
[28] V. Venkatesan, *As Courts Rule on Constitution's Basic Structure, Landmark Doctrine Turns Out to Be Elastic*, THE WIRE, October 29, 2020, available at https://thewire.in/law/constitution-basic-structure-case-histories (Last visited on August 2, 2023).
[29] Burt Neuborne, *The Supreme Court of India*, Vol. 1, INT'L J. CONST. L., 476 (2003); S. P. Sathe, *Judicial Activism: The Indian Experience*, Vol. 6, WASH. U. J.L. & POL'Y, 29 (2001); P. P. Rao, *Basic Features of the Constitution*, Vol. 2, SCC (Jour), 1 (2000); N. A. Palkhivala, *Fundamental Rights Case: A Comment*, Vol. 4, SCC (Jour), 57 (1973); P. K. Tripathi, *Kesavananda Bharati v. The State of Kerala: Who Wins?*, Vol. 1, SCC (Jour), 3 (1974); Upendra Baxi, T*he Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, Vol. 1, SCC (Jour), 45 (1974); Joseph Minattur, *The Ratio in the Kesavananda Bharati Case*, Vol. 1, SCC (Jour), 73 (1974); David Gwynn Morgan, *The Indian Essential Features Case*, Vol. 30(2), ICLQ, 307 (1981); Upendra Baxi, *Some Reflections on the Nature of Constituent Power* in INDIAN CONSTITUTION-TRENDS AND ISSUES, 122 (1978).
[30] Neuborne, *supra* note 29.
[31] Kuldip Nayar v. Union of India, (2006) 7 SCC 1.
[32] Supreme Court Advocates-on-Record Association and Another v. Union of India, (1993) 4 SCC 441.

principle, the doctrine ought to be used as a yardstick for testing the validity of ordinary legislation, and, hitherto, has the judiciary resorted to using the same indirectly?

The authors support the application of the basic structure doctrine to ordinary legislation and submit that the judiciary has been applying the same indirectly/directly in the recent past. Even though the doctrine was evolved initially to test the validity of a constitutional amendment, the non-applicability of the same for testing the validity of ordinary legislation is not analogous to the intention behind the inception of the doctrine.

The process of enacting a constitutional amendment is put through more rigorous strictures than ordinary legislation. The majority of the provisions in the Constitution need to be amended by a special majority of the Parliament, that is, a majority (more than fifty per cent) of the total membership of each House and a majority of two-thirds of the members of each House present and voting.[33] Whereas, in passing an ordinary bill, a simple majority of members are present, and voting is necessary.[34]

Thus, for a doctrine applicable to something purported to be a higher norm (constitutional amendment), is it not logical to extend its application to determine the validity of something assumed as a lower norm (ordinary legislation).[35] This question has been left unanswered in numerous judicial dicta dealing with the issue in hand.

Additionally, the use of constitutional morality to invalidate an ordinary piece of legislation[36] amounts to the use of the basic structure doctrine indirectly. The doctrine of constitutional morality has been described as the means to bow down to the norms of the Constitution and not act in a manner which would become violative of the rule of law of action in an arbitrary manner,[37] or as interpreted in the case of *NCT of Delhi* v. *Union of India*,[38] wherein it has been equated with the basic structure doctrine.[39] The aforesaid ruling held that,

> "Constitutional morality in its strictest sense implies a strict and complete adherence to the constitutional principles as enshrined in the various segments of the document. It is required that all constitutional functionaries "cultivate and develop a spirit of constitutionalism" where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution."[40]

Both doctrines, although considered different, yet have substantial overlapping characteristics and tend to achieve a similar purpose, i.e. to keep a check on the unfettered power of the legislature. It is also pertinent to note herein that both the basic structure doctrine and constitutional morality are a brainchild of the judiciary, and the very fact that its contours are constantly unfolding and being revealed in successive judgments is an indication of its

[33] The Constitution of India, Art. 368.
[34] *Id*.
[35] Pathik Gandhi, *Basic Structure and Ordinary Laws (Analysis of The Election Case & The Coelho Case)*, Vol. 4, INDIAN J. CONST. L., 47-70 (2010).
[36] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.
[37] Manoj Narula v. Union of India, (2014) 9 SCC 1.
[38] NCT of Delhi v. Union of India, MANU/SC/0680/2018.
[39] Surbhi Jindal, *Social Morality vs. Constitutional Morality with Special Reference to Navtej Singh Johar v. Union of India*, MANUPATRA, December 21, 2022, available at https://articles.manupatra.com/article-details/Social-Morality-vs-Constitutional-Morality-with-special-reference-to-Navtej-Singh-Johar-V-Union-of-India (Last visited on August 3, 2023).
[40] NCT of Delhi v. Union of India, (2018) 8 SCC 501.

nebulous and ill-defined nature,[41] making it an effective tool of usage by the courts interchangeably. Thus, in any case, if the argument is raised with regard to the use of basic structure doctrine for adjudication of ordinary legislations, an effective counter of the same by the judiciary lies with the use of constitutional morality, which shares a few common characteristics with the basic structure doctrine.

Further, if it had been the case that the constituent and the legislative power were vested with two different bodies under the Constitution, the difference in the scrutiny upon the same on the yardstick of basic principles of the Constitution would have been prudent. However, since both powers are vested in the same body under the Constitution, it raises a pertinent question as to why ordinary laws should not be made in conformity to the innate and intrinsic values of the Constitution. Further, if that is not the case, why the doctrine of basic structure should not be used to test its validity, as done for constitutional amendments.

Thus, even though the courts have taken a stand that the basic structure doctrine is not a criterion for adjudicating the validity of ordinary legislation, that has not necessarily been the case, as stated in the preceding paragraphs. Arguments continue to be made in courtrooms challenging the validity of ordinary legislation on the grounds of violating the basic structure doctrine. The most recent example of this would be the case of *Indian Union Muslim League* v. *Union of India*,[42] wherein the constitutionality of the Citizenship Amendment Act, 2019, was challenged on the grounds of being violative of the principal secularism and, therefore, of the basic structure doctrine. Furthermore, the observation of the court in *Supreme Court Advocates-on-Record Assn.* v. *Union of India* ('NJAC judgment'),[43] substantiates the contention put forth by the authors that courts have resorted to the basic structure doctrine to invalidate ordinary legislation. Khehar J., in no uncertain terms, held that if a challenge is raised to an ordinary legislative enactment based on the doctrine of 'basic structure', the same cannot be treated to suffer from legal infirmity. It was also held that if a challenge to ordinary legislation is made as a result of the cumulative effect of several articles of the Constitution, it would not always be necessary to list out each article when such cumulative effect has already been determined to be constituting one of the basic features of the Constitution.

Thus, the diverging jurisprudence of judicial review around the applicability of basic structure doctrine to ordinary legislation has created a situation of uncertainty and undue judicial hegemony. This is because there is no coherence between what has been reiterated in numerous judicial pronouncements and the subsequent pronouncement on a similar issue.

## IV. IS THE KESHVANANDA BHARATI CASE A GOOD PRECEDENT IN LAW?

Judicial precedents are an important source of law and they have enjoyed high authority at all times and in all countries.[44] In India, Article 141 of the Constitution gives constitutional status to the theory of precedent in respect of law declared by the Supreme Court. The precedents which enunciate rules of law form the foundation of the administration of justice in India.[45] In addition to the aforesaid, an essential doctrine is the doctrine of *stare*

[41] *See also* Mathew J., in Indira Gandhi v. Raj Narain, AIR 1975 SC 2299 (discusses the vague nature of basic structure doctrine).

[42] Supreme Court Observer, *Citizenship Amendment Act*, June 1, 2023, available at https://www.scobserver.in/cases/indian-union-muslim-league-citizenship-amendment-act-case-background/ (Last visited on August 5, 2023).

[43] Supreme Court Advocates-on-Record Association v. Union of India, (2016) 1 SCC 5, 340.

[44] V. D. MAHAJAN, JURISPRUDENCE & LEGAL THEORY, 191 (6th ed., 2022).

[45] Tribhuvandas Purshottam Thakur v. Ratilal Motilal Patel, AIR 1968 SC 372.

*decisis*, which is founded on the notion that there ought to be certainty and continuity in judicial pronouncements, which is an essential feature of the rule of law,[46] so that in a given set of facts, the course of action which law shall take is discernible and predictable.[47] Unless that is achieved, the very doctrine of s*tare decisis* will lose its significance.[48] The related objective of the doctrine of *stare decisis* is to also put a restraint on the personal preferences and priors of individual judges.[49] Thus, the doctrine of *stare decisis* and precedents are a part of the fundamental values of our legal system.

For a precedent to be treated as an authoritative precedent with a binding value, it should satisfy both numerical and unanimity tests. For instance, in the Indian legal system, for a judicial pronouncement to be treated as an authoritative precedent, the pronouncement should be of a higher court as against the court of which the ruling is under consideration in addition to the fact that it should also be able to horizontally break the divide of opinion between the members of the bench, in case it arises, to satisfy the numerical test. Moreover, to satisfy the unanimity test, the said judgement should be rendered by a majority of the judges who are part of the bench.

From a bare perusal of the Keshvananda Bharati case, it is evident that the pronouncement satisfies the numerical test since the judgement was rendered by a thirteen-judge bench of the Supreme Court, wherein seven ruled in favour of limitation on the unhinged power of the parliament to amend the Constitution. However, does it satisfy the unanimity test? Is the ruling that "Article 368 does not enable Parliament to alter the basic structure or framework of the Constitution" really the view of the majority as perceived, and is it the ratio decidendi of the case? If that is not the case, then does it make it a persuasive precedent rather than an authoritative precedent, and thus, the logical corollary which follows, i.e., is it the law of the land as envisaged in Article 141 of the Constitution?

The thirteen-judge bench in the Keshvananda Bharati case gave eleven different judgments. By only a thin margin of 7:6, the proposition that Parliament does not have unfettered amending power was upheld. However, on a closer analysis of the judgements of the seven judges who ruled against the unfettered power of the legislature, it is hard to decipher the ratio decidendi of Kesavananda Bharati judgment. It is also difficult to accept that the "view of the majority" was indeed the ratio of case signed by nine out of the thirteen judges at the end of the pronouncement of all eleven judgements.

The eleven judgements can be classified into three categories. *First*, the view that there is an inherent or implied limitation to the power envisaged in Article 368 was put forth by Chief Justice Sikri, Justices Shelat and Grover, Hegde, Mukherjea and Jagannathan Reddy. Whereas the *second* category laid down the view point that there are no limitations on the amending power of Parliament which was rendered by other six judges, namely, Justices A. N. Ray, Palekar, Mathew, Dwivedi, Beg, and Chandrachud. The *third* category to which Justice Khanna belonged, held that the amending power was plenary in every sense, but the word 'amendment' in Article 368 by its limited connotation did not lend itself to abrogating the Constitution.[50]

Chief Justice Sikri concluded that the word 'amendment' would not permit the destruction of the democratic structure of the Constitution and the basic inalienable rights

[46] Minerva Mills v. Union of India, AIR 1980 SC 1789.
[47] Narinder Singh v. State of Punjab, 2014 (6) SCC 466.
[48] *Id.*
[49] *Id.*
[50] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶¶1426, 1445.

guaranteed by the Part III of the Constitution and its Preamble.[51] Justice Jaganmohan Reddy's judgment concurred with Chief Justice Sikhri's judgment and he also held that "essential elements constituting the basic structure which cannot be amended".[52] Further, Justice Shelat and Justice Grover in their common judgment held that there were implied limitations on the amending power of the Parliament and that there were certain 'basic elements' of the Constitution.[53] Similarly, Justice Hegde and Mukherjea in their common judgment held that in case the 'basic features' of the Constitution are taken away to the extent that the Constitution is abrogated or repealed, the amending power is subject to implied limitations. They ruled that the Parliament has no power to abrogate or emasculate the 'basic elements' or fundamental features of the Constitution.[54]

Justice H. R. Khanna, the seventh judge in the majority, expressly rejected the notion that there was an inherent limitation to the power of the Parliament, as envisaged by the other six majority judges. He held that the limitation of the basic structure or framework arose only from the limited scope of the word 'amendment', and he rejected the theory of inherent and implied limitations on the amending power.[55] He further ruled that the amending power was plenary in every sense, but the phrase 'amendment' in Article 368, by its limited connotation, did not lend itself to abrogating the Constitution and, thus, coined the term 'basic structure'.[56] Thus, by a strange quirk of fate, the judgement of Justice Khanna, with whom none of the other judges agreed, has become the 'law of the land'?[57]

Thus, the contention that the "view of the majority" is indeed the *ratio decidendi* of the case is untenable. It is always dangerous to take one or two observations out of a long judgment and treat them as if they gave the ratio decidendi of the case.[58] If more reasons than one is given by a tribunal for its judgment, all are taken as forming the ratio decidendi.[59] Additionally, it is not the case that the aforesaid infirmity has not been a subject of consideration before a judicial forum. Yet, the courts have mechanically followed the "view of the majority" without going into the intricacies of the judgements rendered by other judges of the majority.

In his separate and dissenting judgement in the Minerva Mills case, Justice Bhagwati said that finding the ratio in the Kesavananda Bharati case was "a difficult and troublesome question".[60] He said 'the view by the majority' had no legal effect at all and was not the law declared by the Supreme Court under Article 141. It was held in the aforesaid case that,

> "[…] in my view this summary signed by nine judges has no legal effect at all and cannot be regarded as law declared by the Supreme Court under Article 141. It is difficult to appreciate what jurisdiction or power these nine judges had to give a summary setting out the legal effect of the eleven judgments delivered in the case. Once the judgments were delivered, these nine judges as also the remaining four became functus officio and thereafter they had no authority to

[51] Keshavananda Bharati v. State of Kerala, (1973) 4 SCC 225, ¶475(c).
[52] *Id.*, ¶1159.
[53] *Id.*, ¶582.
[54] *Id.*, ¶¶651, 654.
[55] T R ANDHYARUJINA, KESAVANANDA BHARATI CASE - THE UNTOLD STORY OF STRUGGLE FOR SUPREMACY BY SUPREME COURT AND PARLIAMENT UNKNOWN, 43-44 (2011).
[56] *Id.*, 45-46.
[57] *Id.*, 51-52.
[58] Arasmeta Captive Power Co (P) Ltd v. Lafarge India (P) Ltd, AIR 2014 SC 525.
[59] *Id.*
[60] Minerva Mills v. Union of India, AIR 1980 SC 1789, ¶86.

> cull out the ratio of the judgments or to state what, on proper analysis of the judgments, was the view of the majority."

It was further held that,

> "[…] But here it seems that nine judges set out in the summary what according to them was the majority view without hearing any arguments. This was a rather unusual exercise, though well-intentioned. But quite apart from the validity of this exercise embarked upon by the nine judges, it is a little difficult to understand how a proper and accurate summary could be prepared by the judges when there was not enough time, after the conclusion of the arguments, for an exchange of draft judgment amongst the judges and many of them did not even have the benefit of knowing fully the views of others."

Therefore, it is essential to highlight the fact that judgements subsequent to the Keshvananda Bharati case have followed the 'view of the majority' even when it suffers from the defect of *stare decisis*. They have overlooked and assumed the view of the majority as the *ratio decidendi* of the case without actually dissecting and interpreting the opinions of the judges who ruled in favour of limitation on the constituent power of the legislature.

At this juncture, it is imperative to state that although the doctrine as postulated in the Kesavananda Bharati case is a textbook example of *stare decisis et non quieta movere*, which means to stand by decisions and not to disturb what is settled. However, the authors also acknowledge the fact that the doctrine has done more good than harm, and the intent behind the discussion above is purely academic.

## V. AMBIGOUS FATE OF DOCTRINE OF LEGISLATIVE OVERRULING AGAINST THE BASIC STRUCTURE DOCTRINE

Suspicions of autocracy, tyranny and despotism have often led to the birth of a number of legal concepts and doctrines. One such doctrine is the doctrine of separation of powers. Montesquieu is often credited with, if not with, the invention of the doctrine but with being the most influential scholar associated with it. He started from a rather gloomy view of human nature, in which he saw man as exhibiting a general tendency towards evil, a tendency that manifests itself in selfishness, pride, envy, and the seeking after power.[61] He enunciated that every structure of governance had three major functions or 'powers', as he called it – the legislative, the executive and the power of judging. In the bifurcation of these governmental functions, he believed that these functions could not be dispensed by a single person, organ or institution but by different organs that should not transgress the limits of their functions and let the other organs function independently.[62]

While Montesquieu might have manifested a narrow and stricter connotation of the doctrine, democracies around the world have realised the impracticability of such a manifestation due to the practical necessities of governance. As societies have sustained and thrived, a narrow interpretation of the doctrine seems unreasonable and arbitrary, and it has come to be read with the concept of checks and balances.

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[61] W. STARK, MONTESQUIEU: PIONEER OF THE SOCIOLOGY OF KNOWLEDGE, 45 (Routledge, 1960).

[62] European Commission for Democracy Through Law (Venice Commission), *The Judiciary and the Separation of Powers 12-13 February 2000*, 2-3, available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU(2000)021-e#:~:text=The%20objective%20sought%20through%20this,crimes%20or%20conflicts%20among%20individuals%22. (Last visited on February 5, 2024).

As far as the doctrine has played out in India, neither has it been engraved in hard letters in the discourse of Indian constitutionalism and nor is it envisaged in its absolute rigidity. The three organs of governance are a result of the Constitution, and it remains the source of their powers and functions. The Constitution has itself created pathways of desirable permeation and overlap of the functions of these independent institutions with one another, such as delegated legislation, judicial review and legislative overruling, among others. Both judicial review and legislative overruling are tools at the hands of the respective organs to exercise checks and balances on the functioning of the other organ. However, before the authors try to draw parallels between the functioning of the two aforesaid doctrines to meet their desired ambition, a brief explanation of the doctrine of legislative overruling seems pertinent.

The doctrine of legislative overruling is a tool at the hands of the legislature to remove judicial impediments through a legislative process. It is apparent that the Constitution itself vests such power in the parliament wrapped in its constituent powers. Not only is the doctrine assumed to have constitutional backing, but also the Supreme Court itself in the case of *Madras Bar Association* v. *Union of India*,[63] held that certain nature of legislative overruling is permissible and has also laid down principles for its operation henceforth.

There have been innumerable instances of legislative overruling in the history of the Indian judiciary. From the case of *State of Madras* v. *Champakam Dorairajan*,[64] to Golaknath,[65] to *Mohd. Ahmad Khan* v. *Shah Bano Begum*,[66] and most recently in the case of the *Prithvi Raj Chauhan* v. *Union of India* (ST/SC Amendment Act),[67] the constituent power of the Parliament under Article 368[68] has been made a tool at the hands of the legislature to nullify the effects of the judgments of the courts. However, the practical implementation of the aforesaid doctrine has been rather unsatisfactory. The aim of maintaining a harmonious system of checks and balances has been left behind, and the doctrine has become a mere tool for overturning judgements as and when possible, maintaining a hierarchy in the organs and for the Parliament to establish its supremacy over the judiciary in the name of popular will.

Time and again, accusations are hurled at the judiciary for being 'activist' leading to judicial overreach in the name of judicial review. The judiciary has at various junctures attempted to impose values and taken cognisance of situations over which it has no jurisdiction at all. Some instances of the same are forcing patriotism by mandating all cinema halls in India to play the National Anthem before screening the film,[69] or the persistence of the archaic collegium system as opposed to the NJAC or any other system for the judiciary to make

[63] Madras Bar Association v. Union of India, 2015 SCC OnLine SC 388.

[64] State of Madras v. Champakam Dorairajan, AIR 1951 SC 226 (here, the Communal Government Order of the Madras Government was declared void by the Madras High Court, and upheld equality and non-discrimination. The First Amendment to the Constitution added Article 15(4) to invalidate the effects of the judgement and allowed the State to make special provisions for the advancement of socially and educationally backward classes, Scheduled Tribes and Scheduled Castes).

[65] I. C. Golak Nath v. State of Punjab, AIR 1967 SC 1643 (the Parliament passed the 24th Amendment in 1971 to repeal the effects of the Supreme Court judgement. This amendment gave the Parliament the power to amend any part of the Constitution, including the provisions relating to Fundamental Rights. The 24th Amendment was held valid in the case of Kesavananda Bharti).

[66] Mohd. Ahmad Khan v. Shah Bano Begum, AIR 1985 SC 945 (in 1986, the Parliament passed The Muslim Women (Protection of Rights on Divorce) Act, 1986, to nullify the effect of the judgement).

[67] Prithvi Raj Chauhan v. Union of India, AIR 2020 SC 1036 (in 2018, the Parliament introduced §18A to the ST/SC (Prevention of Atrocities Act), 1989, to overturn the safeguards that the Supreme Court introduced in the case of Kashinath Mahajan v. State of Maharashtra, AIR 2018 SC 1498. The former judgement questioned the validity of the act of the Parliament).

[68] The Constitution of India, 1950, Art. 368.

[69] Shyam Narayan Chouksey v. Union of India, AIR 2018 SC 357.

appointments. The hesitation to shift from the collegium system is seen as an attempt of the judiciary to send a message that the power resides with them. However, the application of the doctrine of legislative overruling suffers from the same defect – the incapability to achieve harmony within the organs while maintaining a sound structure of mutual restraint. What is made clear by this is that though both the doctrines of basic structure and legislative overruling are meant to be instruments and tools of checks and balance, in practice they affirm the supremacy of one organ over the other.

The complication created by the doctrine of legislative overruling *vis-à-vis* Kesavananda Bharati is that of the legislature's intent of achieving constitutional governance. The challenge the basic structure doctrine, therefore, posits is in the impediment it creates in the Parliament's ambition of creating laws upon elements recorded to have been made a part of the basic structure doctrine. An understanding of all the judicial precedents related to the basic structure doctrine in India renders us a trend, that of its all-encompassing and overly expanding nature. It is no surprise that the nature of the basic structure doctrine is vague and abstract. Given the elusive nature of the doctrine and the continuing tendency of the judiciary to add elements and constituents to the meaning of the doctrine, there is a continued decrease in the avenues and pathways for the Parliament to legislate upon.

## VI. TWINNING THE DOCTRINES: COLLECTIVE STRENGTHENING OF BASIC STRUCTURE AND CONSTITUTIONAL MORALITY

The conception of the Constitution is reflective of fulfilling the aspirations of the people. The ambition of the Constitution is not only to heal the wounds of the past but also to steer us toward a better future. The judiciary today is not only limited to ascertaining the original intent of the drafters but also to moving away from the archaic schools of law as an aid to interpretation and formulating judicial doctrines in their place such as the basic structure doctrine and the essential practises doctrine, among others. Most of such judicial doctrines share the same intent and objective but are also open-ended, vague and ill-defined, and thus, potent to subjectivity. Their academic intent grossly deviates from how they are practically used, and the fate of the basic structure doctrine and constitutional morality is no different. The present understanding tries to understand and highlight the overlap between the doctrines of basic structure and constitutional morality and the larger repercussions of the same on the polity.

Transformative constitutionalism in the Indian legal system began with the evolution of the basic structure doctrine and led to the formulation of constitutional morality. The doctrine of the basic structure of the Constitution began as a tool at the hands of the judiciary to practise checks and balances against the constituent power of the Parliament to deter them from tampering with the originality of the Constitution. So much so that it was referred to as the North Star by Chief Justice D. Y. Chandrachud – an unfailing guide which shows the way when the path appears convoluted.[70] Whereas, on the other hand, the doctrine of constitutional morality was first invoked in the Indian constitutional thought by Dr. B. R. Ambedkar. Ambedkar adopted the conceptualisation of constitutional morality as put forward by George Grote.[71] Further, while neither of the doctrines was expected nor intended to be used as an instrument against the law-making power of the Parliament, parallel and superimposed

[70] India Today, *Basic Structure of Constitution Guides like North Star: C.J.I. DY Chandrachud*, INDIA TODAY, January 22, 2023, available at https://www.indiatoday.in/law/story/cji-dy-chandrachud-says-basic-structure-of-constitution-guides-judges-like-north-star-2324861-2023-01-22 (Last visited on August 3, 2023).

[71] Pratap Bhanu Mehta, *What is Constitutional Morality?*, November, 2010, available at https://www.india-seminar.com/2010/615/615_pratap_bhanu_mehta.htm (Last visited on August 3, 2023).

usage of both these doctrines have met the same consequence. These doctrines share not only the same objective but also the same shortcomings. The objectives find place in the subsequent paragraphs, their shortcomings are pertinent to be noted at this point. Both doctrines are ill-defined and have open contours, they are ambiguous and based on principles and ideas rather than specific points of law.

They aim to safeguard the spirit of the Constitution, keep its originality intact, serve as tools of justice and curb instances of parliamentary autocracy. However, they certainly do not stand for these goals today. Both these doctrines are the creation of the judiciary giving it exclusive control over what they mean, and the judicial monopolisation of developing, defining, reviewing and restricting their boundaries. The courts have resorted to the coterminous usage of the two doctrines, almost substituting it for the doctrine of the rule of law and painting the doctrine of constitutional morality nearly as basic structure test.[72] In the case of *Navtej Singh Johar* v. *Union of India*,[73] Dipak Mishra CJI, painted constitutional morality as a ground for invalidating any law as he clearly stated that any law opposed to constitutional morality would be unconstitutional.

More often than not, the doctrine of constitutional morality is invoked to question the constitutionality of laws put in place by the Parliament. Presently, the judicial position over the application of the basic structure upon the law-making power of the legislature in addition to the constituent power is settled, yet its application is ambiguous. However, the fact that the constituents of both the doctrines are similar if not congruent and that the application of one in the absence of the other is made to achieve the same objective, i.e., of exercising checks upon the Parliament, is something that demands an inquiry. Judicially, recent trends show the application of the doctrine of constitutional morality as a substitute for the basic structure upon the legislative power to allegedly curb the attempts of parliamentary sovereignty. The parallel usage of both these doctrines acts as an impediment on the freedom of the parliament to legislate.

The parallel usage of the doctrines by the judiciary in cases dealing with the constitutionally vested power of the legislature has given rise to the allegations of judicial overreach and activism. It is stated that the judiciary, in the name of protecting the letter and spirit of the Constitution, invariably invoking these doctrines has led to the diminished power of the legislature and toppling of the doctrine of separation of powers.[74] More than anything, the trend of judicial legislation has only increased owing to the ill-defined contours of these doctrines.

It is pertinent to note that there is an overlap between the doctrines of the basic structure of the Constitution and constitutional morality. While both these doctrines, in addition to the bare text of the Constitution, not only increase the scope of judicial review manifoldly but have also become instruments in the hands of the courts to excessively keep the Parliament in check, possibly even when the need for it is not felt.

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[72] Mohan V. Katarki, *Basic Structure and Constitutional Morality: Are They Meta-Constitutional Norms?*, THE LEAFLET, June 26, 2023, available at https://theleaflet.in/perils-of-judicial-monopolisation-critiquing-the-judiciarys-misuse-of-constitutional-morality-as-a-double-edged-sword/ (Last visited on August 3, 2023).

[73] Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.

[74] Thabitta R., *Problems with the Application of the Basic Structure Doctrine in India: Why Limiting the Constitutional Amendment Powers of the Legislature is a Bad Idea*, IACL-AIDC BLOG, February 10, 2022, available at https://blog-iacl-aidc.org/new-blog-3/2022/2/10/problems-with-the-application-of-the-basic-structure-doctrine-in-india-why-limiting-the-constitutional-amendment-powers-of-the-legislature-is-a-bad-idea (Last visited on February 5, 2024).

All these factors combined do raise a pertinent question – has the judiciary in India been transformed into a parallel law-making body? What is being argued is whether the answer to the question posed is or is not in the affirmative and not the functionality of the legislation put in place by the judiciary. The judiciary, without a doubt, has played an extensive role in transforming social outlook, produce an antidote to potential conceptions of morality and shaping public morality. However, the question is - how constitutionally appropriate is the judiciary in doing so, allegedly violating the doctrine of separation of powers and overstepping its boundaries? The question posed is not to threaten or question the creativity of the bench in constitutional interpretation. It is to limit it to meet the intention of the drafters of the Constitution, something the judiciary has aspired for itself.

As far as the overlap between constitutional morality and judicial review is concerned, it has to be kept in mind that the judiciary has, in several cases, not only invoked the doctrine of constitutional morality to invalidate ordinary laws on the ground of them being unconstitutional, but has also gone on to invoke the basic structure doctrine itself to adjudicate upon its constitutional validity. This coterminous application of both doctrines only aggravates the confusion. While the domain of the application of the basic structure is wider than that of the doctrine of constitutional morality, both seem to operate in overlapping terrains. Both these doctrines become tools to challenging legislative acts. The idea of constitutional morality is somewhere subsumed in the basic structure of the Constitution itself and to apply them parallelly and differently is to mean creating an imbalance in constitutional ethos. It tilts the scales in favour of the judiciary as opposed to the judiciary.

The way forward, therefore, seems to be either for the judiciary to legitimise the application of the basic structure doctrine upon the legislative powers of the Parliament or for them to completely refrain from the parallel usage of both the doctrines.

One often forgets that legislative actions are not merely confined to constitutional amendments but they also extend to the enactment of laws and policies. The doctrine of basic structure acts as a safeguard against the dilution of the Constitution from the amendment making power and not the law-making power of the legislature. However, this cannot mean that ordinary laws do not impinge upon constitutional identity, provisions and principles merely because the text of the Constitution remains unchanged. The authors have, therefore, tried to make a case enough to explain why the basic structure doctrine should apply to ordinary legislation. While this is done, one cannot forget the uncertainty created by the overlap of the doctrines of constitutional morality and basic structure. For this to be curbed or effectively handled, any contradiction on whether the test of basic structure is to apply or not should be decided in favour of the recent judgements, by a larger bench, calling for the application of the basic structure doctrine on ordinary legislations. Furthermore, judicial review of statutes should not be contained to mere provisions of the Constitution, but to the ideas and principles protected as basic structure that guide the interpretation and working of the Constitution.

## VII. CONCLUSION

The basic structure doctrine is an indispensable feature of constitutional supremacy and the rule of law in all sovereign States. The paper briefly discusses the doctrine and scholars behind its origin, the judicial journey predating the Kesavananda Bharati judgment and the overtly visible shift in the judicial attitude towards the legislature in an attempt to preserve the foundation of the Constitution. Furthermore, the development of the doctrine after 1973 has been focused upon while highlighting the fact that this development, more often than

not, coincided with ongoing political conundrums which brought the scuffle between the judiciary and legislature to the foreground.

The paper then goes on to discuss the contemporary challenges that surround the discussion upon the basic structure doctrine in today's day and age. *First*, is the controversial debate on the application of the doctrine upon the legislative power of the Parliament as opposed to merely its constituent power. The authors try to put forth theoretical and practical grounds for their assertion that the law-making power of the Parliament should be subject to and tested on the metric of the basic structure doctrine. This assertion implies an expansive scope of the power of judicial review of the judiciary. *Second*, the authors attempt to investigate the precedential value of the Kesavananda Bharati case and whether it meets the ends of the doctrine of stare decisis. *Third*, the tussle between the judiciary and the legislature is enquired into while focusing on the conceptual backdrop of the doctrine of separation of powers and the exercise of checks and balances. Furthermore, parallels in the functioning of judicial review and legislative overruling are drawn to completely understand the difficulties on part of the legislature *vis-à-vis* the dictum in the Kesavananda Bharati case. And lastly, the authors are grappling with the analogous application of the doctrines of constitutional morality and basic structure and question – whether the judiciary in India has been made into a parallel law-making body?

In dealing with all these questions, it has been made abundantly clear that no democracy can survive without an active and potent judiciary. In arguing for the application of the basic structure doctrine over the legislative power of the Parliament, the author's faith in the capacity of the judiciary to exercise mutual restraint is elucidated. However, this backing for judicial review cannot exist in a vacuum from the infirmities its application suffers from today. Judicial review, as was academically envisaged and as is practically put to use, stands at crossroads. It was not envisioned to be a mere prop at the disposal of the judiciary against the functioning of the legislature but an instrument to further the values of constitutionalism.

The only way forward to advocate for judicial review while being mindful of integrating it with its academic vision is for the judiciary to exercise judicial restraint. Judicial restraint then becomes an element of the doctrine of separation of powers. The court appears to view judicial expansionism as a natural corollary to its objective of being the guardian of the Constitution. Yet, one has to view these claims with some cynicism. The task of the judiciary is to check that the government is working 'lawfully' and not to comment upon its 'efficacy', and the same cannot be assumed under the garb of judicial review. Therefore, what the paper is at some points critical about is not the power of judicial review of the courts, but them colouring their unwarranted activism in the name of review.

The judiciary sometimes justifies its exercise of review and activism in the name of filing legislative vacuums. The principled exercise of judicial review is the need of the hour. Many speak in favour of context-specific use of doctrines, for these doctrines are an invention of the judiciary for the factual matrix of a particular case at hand. However, this contestation is diametrically opposed to the objective of these doctrines, especially in discourses such as constitutional law, which homes numerous abstract concepts. These doctrines try to strike a balance between different constitutional values and their magnanimity in doing the same has to be recognised. The aim of these doctrines cannot be limited to one, two or a handful of cases, for these doctrines set strong precedents in law to cope with the unconstitutional assumption of power.

The magnificence of the Constitution will always leave room for disagreement and contention. Constitutional choices have been made and will have to be made for

constitutionalism to prevail. One such choice was the emergence of the basic structure doctrine. It has spanned for half a century, and therefore, debate and discussion around it are only natural. The present paper is an effort at academic dialogue on the contemporary issues surrounding the doctrine.